

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1366

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/s

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

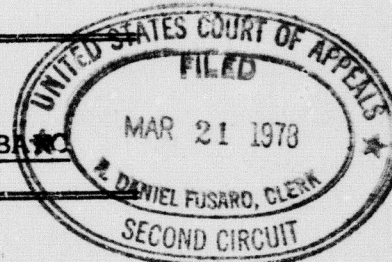
-against-

GJERDJ KALAJ and
LAWRENCE MORICI,

Defendants-Appellants.

Docket No. 77-1366

PETITION FOR REHEARING
ON BEHALF OF APPELLANT MORICI
WITH SUGGESTION FOR REHEARING EN BANC



APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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-against-

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APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellant Lawrence Morici respectfully seeks rehearing with a suggestion for rehearing en banc, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, from a judgment of a panel of this Court* (Oakes, C.J.; Wyzanski** and Neaher,** D.JJ.) entered on March 7, 1978, affirming in

*A copy of this Court's order is annexed as Appendix A.

**United States District Judges, sitting by designation.

open court without opinion a judgment rendered by the United States District Court for the Southern District of New York (Werker, D.J.), convicting appellant Morici of conspiring to transfer firearms in violation of 26 U.S.C. §§5811, 5812, 5861(d)(e)(i), 18 U.S.C. §371.

I

This case presents a question not previously the subject of a decision of this Court, and one vital to the fair administration of justice: Whether a district judge has the power to compel the United States Attorney's office for the Southern District of New York to grant testimonial use immunity, previously authorized by the Justice Department, to a potential defense witness who has claimed his Fifth Amendment right against self-incrimination but who possesses exculpatory information essential to the defense.

As Chief Judge Bazelon stated in denying rehearing en banc in United States v. Gaither, 539 F.2d 753, 754 (D.C. Cir. 1976):*

*In Gaither, Judge Bazelon declined to vote for en banc consideration because defense counsel had failed to ask the district judge to order the Government to grant immunity to the witness. However, he indicated that the question involved was "perhaps" an issue of first impression in the federal courts. United States v. Gaither, supra, 539 F.2d at 754 and n.1; but see Thompson v. Garrison, 516 F.2d 986, 988 (9th Cir. 1975); see Western, Compulsory Process, 73 Mich. L.Rev. 71, 166-170 (1974); Note, A Reexamination of Defense Witness Immunity: A New Use for Kastigar, 10 Harv. J.Legis. 74 (1972). Both commentators conclude that district judges may compel the Government to apply for an order of use immunity.

The considerations on each side of the question are weighty. On the one hand, criminal defendants obviously have a substantial interest -- one that implicates constitutional values -- in obtaining exculpatory testimony, and the public in assuring that all relevant evidence bearing on guilt or innocence is presented to the fact finder. On the other hand, compelling the Government to grant use immunity may offend separation of powers principles and may jeopardize future prosecutions of the immunized witness since in any future prosecution the Government will have to prove that the immunized testimony was not used.

Id., 539 F.2d at 754.

See also United States v. Morrison, 535 F.2d 223, 229 (3d Cir. 1976). Thus, as in other situations in which the judiciary is required to review discretionary decisions of the executive, standards must be created to protect the respective rights involved. The facts of this case reflect that the Government's legitimate interests in declining to apply for an order of use immunity (see, e.g., United States v. Alessio, 528 F.2d 1079, 1081-1082 (9th Cir. 1976)) were nonexistent here and that the judge's refusal to compel the Government to do so was arbitrary.

The proof at trial showed that on December 21, 1977, co-defendant Gjerdj Kalaj sold 100 pen guns to undercover agent Mathew Raffa (104-106*). The Government's theory was that appellant Morici had supplied the pen guns to co-defendant James Johnson who, in turn, gave them to Kalaj. Appellant

*Numerals in parentheses refer to pages of the trial transcript. The evidence at trial showed that a sample of these weapons could fire .22 caliber bullets (307-309, 317, 320-321, 348).

Morici, who had never been arrested before, did not dispute that he had sold Johnson objects similar to those purchased by Agent Raffa. However, appellant testified that the instruments he transferred had barrels with smaller apertures than those which had been sold to Raffa. Further, appellant stated that he believed the objects he sold were tear gas pen guns, capable of emitting only tear gas, and that he would never have become involved had he thought the pen guns were capable of firing a bullet (604-606, 611, 633, 651, 676). Appellant also stated that in his dealings he generally referred to the items as "tear gas guns" or "tear gas pen guns" (606-607).

This testimony was supported by the pre-trial statements made by co-defendant Johnson to the Assistant United States Attorney who tried the case. Prior to trial, Johnson had told the prosecutor that appellant Morici referred to the instruments in question as tear gas guns and that he had offered to supply tear gas shells for them (393-394, 381).

The defense sought to use Johnson as a witness at trial. However, Johnson, who had entered a guilty plea to the conspiracy count of the indictment but had not yet been sentenced on that charge,* asserted his Fifth Amendment privilege. After the district court ruled that it would respect Johnson's assertion of his Fifth Amendment privilege,** defense counsel asked

*The Government had agreed to dismiss the remaining open counts against Johnson (384).

**A hearing was held outside the jurors' presence on this question.

that the Government be compelled to grant testimonial use immunity to the co-defendant, allowing him to testify (596). During trial, the prosecutor revealed that in contemplation of calling the co-defendant as a rebuttal witness, her office had requested permission from the Justice Department to seek an order of use immunity (380-381). Despite the grant of this permission ("Washington has given my office permission to seek immunity. I have not at this point sought immunity..." (596)), the district court denied the defense application. Judge Werker ruled that the Government has "the discretion as to applying for immunity. The Court cannot do it sua sponte. If it would be possible for me to do it sua sponte, I would do it" (598). The district court's absolute rejection of appellant's claim, without analyzing and balancing the specific interests involved, in light of the facts of this case, was improper.

The Government had virtually no interest in failing to immunize Johnson. Since the potential witness had entered a plea of guilty to one count of the indictment and the Government had already agreed to dismissal of the open counts, the granting of use immunity could not pose the risk of an "immunity bath," see United States v. Morrison, supra, 535 F.2d at 229, and did not jeopardize the Government's prosecution of Johnson nor interfere with its discretion to decide whether to prosecute at all — traditional justifications for denying defense witnesses use immunity. See United States v. Alessio, supra, 528 F.2d at 1079-1080 (quoting United States

v. Nixon, 418 U.S. 683 (1974)). Moreover, the authorities in the Justice Department had already given their permission to apply for the relevant order, reflecting the Government's own determination that its interests were not jeopardized by granting Johnson use immunity.

On the other hand, Johnson's exculpatory testimony was critical corroboration of appellant's claim of innocence, and the evidence might well have made the difference in the jurors' deliberations.

In addition to these due process considerations, appellant's right to present witnesses and to compel the Government to grant use immunity in order to do so is grounded in the Sixth Amendment which, inter alia, guarantees that

[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor.

One commentator has noted:

The clause guarantees the accused official 'process' for compelling witnesses to appear and testify in his favor. It was adopted to give the defendant at least as much access as that of the prosecution to governmental devices for obtaining testimony in his favor.

Westen, Compulsory Process,
73 Mich. L.Rev. 71, 168 (1974).

While the right to compulsory process might potentially conflict with the Fifth Amendment right against self-incrimination, where, as here, a defense witness asserts the privilege, the grant of use immunity eliminates any conflict, allows both rights to operate freely, and places the parties in the same

position as if the witness had actually been allowed to assert the privilege:

We conclude that the immunity provided by 18 U.S.C. §6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.

Kastigar v. United States,
406 U.S. 441, 463 (1972).

On appeal, appellant Morici renewed his claim that the district court's failure to compel the United States Attorney's office to grant John's testimonial use immunity violated appellant's Fifth and Sixth Amendment rights to due process and compulsory process, respectively. The resolution of the issue is important to government prosecutors, to the defense bar, and to the administration of criminal justice. One federal appellate judge has termed the question one of first impression. Its disposition at oral argument without written opinion was an inappropriate invocation of Rule 23 of the Rules of this Court dealing with affirmances in open court.*

*The Government relied on this Court's opinion in United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975), cert. denied, 425 U.S. 902 (1976). However, Stofsky dealt only with the propriety of comments made during summations.

II

This case also presents the question of whether the district court's summary rejection of appellant's jury charge, which was designed to present appellant's defense to the jury, in light of the instructions actually given, resulted in the conviction of an innocent man.

Appellant asserted that he had no knowledge that the objects transferred were capable of firing a bullet. Prior to the district court's charge,* appellant Morici requested that the court submit this defense theory to the jurors for their consideration (see Record on Appeal, Document #8). Specifically, counsel asked the judge to instruct the jurors that if they had "a reasonable doubt that what [appellant Morici] sold, transferred or delivered were then capable of firing .22 calibre bullets, or if [they had] a reasonable doubt that Lawrence Morici had knowledge that they were then capable of firing .22 calibre bullets, then [the jurors] must find Lawrence

*The complete text of Judge Werker's charge is annexed as Appendix B.

Morici not guilty of conspiracy under Count 1 of the indictment."* Over defense objection, the district court refused to give this instruction (724-725, 757, 739-740).

The requested charge was a correct adaptation of the relevant law to the facts of the case. In United States v. Freed, 401 U.S. 601, 607 (1971), the Supreme Court discussed and implicitly approved prior lower court decisions holding

*Defendant's Request No. 5 reads as follows:

REQUEST NO. 5

Membership in a Conspiracy —
Specific Questions re Lawrence Morici

If you find that the government has proven beyond a reasonable doubt that the conspiracy charged in Count 1 of the indictment existed, then in determining whether the defendant Lawrence Morici was a member of that conspiracy, I charge you as follows:

If the government has proven beyond a reasonable doubt that on or about December 20, 1976, Lawrence Morici sold, transferred or delivered approximately 100 .22 calibre pen guns capable of firing a .22 calibre bullet, with knowledge that such pen guns were then capable of firing a .22 calibre bullet, then you must find the defendant, Lawrence Morici, guilty of conspiracy under Count 1 of the indictment.

If you have a reasonable doubt that what he sold, transferred or delivered were then capable of firing .22 calibre bullets, or if you have a reasonable doubt that Lawrence Morici had knowledge that they were then capable of firing .22 calibre bullets, then you must find Lawrence Morici not guilty of conspiracy under Count 1 of the indictment.

that, for conviction of a substantive violation of the pertinent statute,* the type of knowledge "required to be proved was knowledge that the instrument possessed was a firearm. See Sipes v. United States, 8 Cir. 321 F.2d 174, 179, and cases cited." Id., 401 U.S. at 607. See also concurring opinion of Mr. Justice Brennan at 401 U.S. at 614 ("The cases held that a conviction of an individual of illegal possession of an unregistered firearm had to be supported by proof that his possession was 'willing and conscious' and that he knew the items possessed were firearms"). "In other words, a tear gas gun capable only of discharging tear gas would not be considered a firearm." United States v. Decker, 292 F.2d 89, 90 (6th Cir.), cert. denied, 368 U.S. 834 (1961).

Consequently, in order to convict on conspiracy, the jury was required to find that appellant had at least that degree of criminal knowledge necessary for the underlying crime (United States v. Feola, 420 U.S. 680, 696 (1975); see also United States v. Dickerson, 508 F.2d 1216 (2d Cir. 1975); United States v. Crimmins, 123 F.2d 271, 272 (2d Cir. 1941)) -- that is, knowledge that the instruments transferred were firearms, capable of firing a shot. United States v. Freed, supra; United States v. DeBartolo, 482 F.2d 312, 316 (1st Cir. 1973); cf. United States

*The pertinent provision of 26 U.S.C. §5845(e) defines a firearm in the following manner:

... any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive....

v. Vasquez, 476 F.2d 730, 732 (5th Cir. 1973) (possession of an item which the defendant knew to be a firearm within the general definition of the term required).

Based on the Government's consistent position (692-694), renewed on appeal (Government's Brief at 14, 19-23), that such knowledge was not required and irrelevant under the National Firearms Act, so long as the weapons could, in fact, fire a shot, the district court rejected the submitted instruction, and did not tell the jurors that knowledge of the weapon's capability was required to convict. Thus, the jurors were impermissibly permitted to convict if they found an unlawful purpose to sell tear gas guns without complying with federal transfer and tax requirements, so long as those guns were subsequently shown to be capable of firing a bullet, whether or not appellant then knew of that fact.*

*The district court stated that the second element required for conviction on conspiracy was "that it was an object of this agreement for the defendants to unlawfully transfer firearms without having filed a written application to do so, without having paid the required transfer tax, and without approval of the Secretary of the Treasury or his delegate, or to unlawfully receive or possess a firearm not identified by a serial number, or for each of them to receive and possess a firearm not registered to him in the National Firearms Registration and Transfer Record" (820). On appeal, the Government relied, in part, on this instruction to satisfy any necessary instruction on knowledge. However, the instruction simply did not require the jurors to find that appellant knew that what was then transferred was capable of operation. Moreover, in connection with Count II, which did not involve appellant, the district court defined a firearm as a device from which a shot could be discharged. Without telling the jurors that, to convict of conspiracy, appellant was required to know of that fact, this charge on Count II only compounded the problem, since there had been proof that a weapon similar to that transferred by appellant had, in fact, fired a bullet.

CONCLUSION

For the foregoing reasons, rehearing or rehearing en banc should be granted.

Respectfully submitted,

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March 21, 1978

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of March one thousand nine hundred and seventy-eight.

Present:

HON. JAMES L. OAKES
Circuit Judge

HON. CHARLES E. WYZANSKI

HON. EDWARD R. NEAHER
~~XXXXXX~~ District Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GJERDJ KALAJ, LAWRENCE MORICI, JAMES JOHNSON
Defendants
LAWRENCE MORICI,
Defendant-Appellant.

77-1366

Appeal from the United States District Court for the Southern
District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgement of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER,
Deputy Clerk

USA vs 1
Kalaj, et al. 2
77 Cr. 136
(HFW)
5/14/77
Hon.
H.P.
Werker

mdrf 1

807

CHARGE OF THE COURT

(After recess.)

THE CLERK: The Court is about to charge the jury. Any spectator who wishes to leave the courtroom will do so now or you will have to remain seated until the completion of the Court's charge.

THE COURT: I am using this microphone, ladies and gentlemen, because I think you may not be able to hear me above the din outside.

Mr. Foreman and ladies and gentlemen of the jury. Now that the evidence is all in and counsel have summed up their respective contentions the time has come for you and me to perform our respective functions in the administration of justice in this case.

As I stated to you at the outset, it is my duty to instruct you as to the principles of law to be followed, and it is your duty to accept those instructions as they are given by me and apply them to the evidence in this case.

The indictment against these defendants is not evidence, and it does not carry with it any presumption of guilt. It is merely a means by which the defendants and the jury are informed of the nature of the charges or accusations and the means of bringing the defendants

mdrf 2

to trial.

The defendants in this case have pleaded not guilty, and by that plea have put in issue each of the elements of the charges against them. You may not give any weight whatever to the fact that an indictment has been returned against the defendants. It is your duty to determine the facts as derived from your consideration of the evidence in this case and then applying the principles of law to decide whether each of the defendants on trial before you is guilty or not guilty of any of the charges made against him.

You are the sole and exclusive judges of the facts. If your recollection of the evidence differs in any way from the recollection of counsel or the Court, your recollection controls and should be relied on by you. Your judgment as to what the facts are controls. The government and these defendants are equally entitled to justice in this court. The fact that this prosecution is brought in the name of the United States of America does not entitle the government to any greater consideration than any other litigant would get. But by the same token it is entitled to no less consideration.

The issues in this case must be decided on the evidence and on the law. In this regard you are instructed

mdrf 3

that the statements and arguments of counsel are not evidence unless made as an admission or a stipulation of fact.

Also, in proving the charges against the two defendants on trial before you the government introduced evidence of the acts and declarations of a third defendant who is not on trial here. You may not draw any inference favorable or unfavorable towards the government or the defendants on trial from the fact that the third defendant is not on trial before you now. You are not to speculate as to the reasons why he is not on trial. Those matters are wholly outside your concern and have no bearing on your function as jurors.

Before I turn to the indictment in the case, and the charges that are made against the defendants here, let me first give you a few basic principles that should govern you in your deliberations.

First of all, you should approach your duty with an attitude of complete fairness and impartiality, one in which you reach your decision solely on the basis of the evidence and in accordance with the legal instructions I am about to give you.

Under your oath as jurors you should not and cannot allow sympathy for the defendants or consideration

1 mdrf 4

2 of punishment they might receive should they be found
3 guilty to enter into your deliberations or to affect
4 or influence your judgment in any way.

5 The duty of imposing sentence in the event
6 of a conviction would rest exclusively upon the Court
7 and upon the Court's own conscience.

8 During the trial I have been called upon to
9 make rulings from time to time, and I have sustained
10 some objections, I have overruled others. On one or two
11 occasions I may have ordered testimony stricken and have
12 advised you to disregard it. It is important in the
13 performance of your duties that you limit your
14 consideration of the evidence to that which was actually
15 received in the case and not give any consideration
16 to any evidence which was stricken.

17 It is equally important that you don't draw
18 inferences against either side because of any objections
19 that their counsel may have made during the trial or
20 any arguments that counsel may have made, or the fact
21 that it may have been necessary from time to time to engage
22 in conferences at the side bar or to exclude you from
23 the courtroom altogether.

24 Under our system of justice in this country it
25 is the function and duty of counsel to object to anything

mdrf 5

1
2 that they think is legally improper, and they would be
3 remiss in their duty if they failed to do so. But it is
4 my function and duty to rule on these questions of law,
5 and I would be remiss in my duty, too, if I failed to make
6 such rulings, even though sometimes they may not have
7 been to the liking of counsel for either side.

8 If during the course of the trial from my rulings
9 or questions or facial expressions on some of the questions
10 or some of the questions I put to the witnesses you got
11 the impression that I personally have any views on the
12 credibility of any of the witnesses or on the weight to
13 be given to their testimony, or to the proof, or to the
14 merits of the case, please disregard it. It is not my
15 intention to imply or express any opinion or any views
16 to you with respect to the facts in this case or the merits
17 or the credibility of any witness. That is your sole and
18 exclusive function.

19 Any questions which I may have put to witnesses
20 during the course of the trial have been put to those
21 witnesses in an attempt to clarify issues which you might
22 ultimately decide. It was not to give you the impression
23 that I was siding one way or another. Whatever my feelings
24 may be in this matter are completely immaterial. Let
25 me give you a few more basic principles of general application

1 mdrf 6

2 As I have indicated, no inference is to be
3 drawn from the indictment or from the fact an indictment
4 has been filed.

5 The grand jury was not asked to determine whether
6 these defendants were guilty or not guilty of the charges
7 contained in the indictment. That is your function as
8 jurors, and your function alone.

9 Under our law every defendant, and that is true
10 of the defendants in this case, is presumed to be innocent.
11 That presumption of innocence is in each defendant's favor
12 throughout the entire trial and extends even into your
13 deliberations in the jury room. It is overcome only if,
14 as and when you determine that his guilt has been established
15 beyond a reasonable doubt by the credible evidence in the
16 case.

17 The burden is upon the government to establish
18 each defendant's guilt beyond a reasonable doubt, and that
19 burden applies to every element of each crime charged
20 against each defendant. That burden of proof never shifts
21 to the defendant, it always remains with the government
22 right down to the end of the trial.

23 I have mentioned the term "beyond a reasonable doubt."
24 What does that mean? As the words imply, it is such a
25 doubt as will be entertained by a reasonable man after

mdrf 7

all the evidence in the case is carefully analyzed, compared and weighed. A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Since the burden is upon the government to prove each defendant guilty beyond a reasonable doubt of every essential element of each crime charged, a defendant has the right to rely upon a failure of the prosecution to establish such proof.

Absolute or mathematical certainty is not required, but there must be such certainty as satisfies your reason and judgment, and such that you feel conscientiously bound to act upon. It is not a fanciful doubt or a whimsical or capricious doubt, for anything relating to human affairs and depending upon human testimony is open to some possible or imaginary doubt.

A reasonable doubt is such doubt as would cause a prudent person to hesitate before acting in matters of importance to him. In other words, if the evidence warrants, in your judgment, the conclusion that a defendant is guilty so as to exclude every other reasonable conclusion, you should declare him guilty.

On the other hand, if on all the evidence you have a reasonable doubt as to the guilt of the defendant you must find him not guilty.

1 mdrf 8

2 Whenever in these instructions I tell you that
3 a certain element must be established before there can be
4 a conviction of a defendant on a certain count, I mean
5 that this element must be established according to the
6 standard of proof I have just explained. That is, proof
7 beyond a reasonable doubt.

8 That standard applies to every finding that
9 is essential to a conviction of either defendant on any
10 count. If I don't repeat that standard of proof each time
11 bear in mind that it applies every time I speak to you
12 about an element of the offense or a finding that you are
13 entitled to make.

14 So with respect to all such elements or findings
15 necessary for conviction on any count I instruct you that
16 you may not conclude that such an element or such a finding
17 is established simply because you may think the weight
18 of the evidence tips somewhat in favor of the government.
19 The standard of proof is proof beyond a reasonable doubt.

20 The indictment in this case contains six counts.
21 Count 1 charges the defendants with conspiracy, and
22 Counts 2 through 6 charge the defendant Gjerdj Kalaj
23 alone with what lawyers call substantive counts. Each
24 of these counts charges a separate offense or crime and
25 must be considered separately.

The indictment names three defendants. Only two defendants, Lawrence Morici and Gjardj Kalaj, are on trial before you. They are the only persons whose guilt or innocence you must announce in your verdict. Although as I will explain to you shortly in considering their guilt or innocence you may have to determine the nature of the participation, if any, of the other named defendant, James Johnson.

In determining whether a given defendant is guilty or not guilty you must bear in mind that guilt is personal. Thus, whether each of the two defendants on trial before you is guilty or not guilty of each of the various counts in the indictment in which the particular defendant is named must be determined separately with respect to him and solely on the evidence presented against him or the lack of evidence.

The case of each particular defendant stands or falls upon the proof or lack of proof of the charges against him and not against somebody else.

Let us turn to the specific charges against the defendants. The first count charges a conspiracy. It charges that the defendants here on trial, together with other co-defendants, conspired to violate the Federal Gun Control Laws with respect to the transfer of firearms,

mdrf 10

specifically pen guns, and with respect to the registration and serialization of pen guns.

As I already mentioned, Counts 2 through 6 are substantive counts. The conspiracy count charges the defendants with conspiring to commit offenses while the substantive counts charge the defendant Gjerdj Kalaj alone with the actual commission of them -- that is, with actually carrying out those alleged offenses, as well as other alleged offenses.

Thus, Count 2 charges that Gjerdj Kalaj unlawfully, intentionally, and knowingly transferred 100 serialized pen guns without paying the federal transfer tax or applying to the Secretary of the Treasury for permission to transfer same.

Count 3 charges Gjerdj Kalaj unlawfully, willfully and knowingly received and possessed 100 unserialized pen guns.

Count 4 charges that Gjerdj Kalaj unlawfully, willfully and knowingly received and possessed 100 pen guns none of which were registered to him in the National Firearms Registration and Transfer Record.

In addition, Gjerdj Kalaj is charged with two more substantive offenses. In Count 5 he is charged with unlawfully, willfully and knowingly carrying a loaded Baretta semi-automatic pistol unlawfully during

mdrf 11

the commission of a federal felony.

And in Count 6 Gjerdj Kalaj is charged with unlawfully, willfully and knowingly carrying a loaded unserialized pen gun unlawfully during the commission of a federal felony.

Since the essential elements which the government must prove before conviction may be had on the substantive counts differ from the essential elements of the crime of conspiracy we shall consider each separately.

I believe it will be somewhat clearer for you if I first discussed the conspiracy count, that is Count 1, of the indictment.

There is a difference of which you should be made aware between the conspiracy count and the substantive counts before you. A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime which may be the objective of the conspiracy.

Conspiracy is collective criminal activity or an agreement or understanding to violate other laws. It presents a greater potential threat to the public and is usually more difficult to detect than the illicit or criminal activity of a single individual. Thus, if a conspiracy exists, even if it should fail of its purpose, it is still punishable as a crime.

mdrf 12

Consequently, in a conspiracy count there is no need to prove that pen guns were ever actually transferred by the defendants or that they actually possessed pen guns. As I have said in Count 1 both of the defendants are charged with conspiracy in violation of Section 371 of Title 18, United States Code. That section provides in part that, "If two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to affect the object of the conspiracy each" is guilty of a crime.

Thus, the indictment charges in Count 1 that, "From and on or about February 20, 1976, through December 31, 1976, in the Southern District of New York, Gjerdj Kalaj, Lawrence Morici and James Johnson, the defendants and others to the grand jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Section 5861 of Title 26 of the United States Code.

Two: It was part of said conspiracy that the defendants unlawfully, willfully and knowingly would transfer firearms, to wit pen guns, in violation of Title 26, United States Code, Section 5812 in that the defendants wouldn't file a written application with the Secretary of the Treasury, or his delegate, for the

mdrf 13

transfer and registration of the firearms, wouldn't pay the transfer tax required by Title 26, United States Code, Section 5811, and wouldn't obtain the approval of the Secretary of the Treasury or his delegate for the transfer and registration of the firearm.

Three: It was further part of said conspiracy that the defendants unlawfully, willfully and knowingly would receive and possess a firearm, to wit a pen gun, which was not then identified by a serial number as required by Chapter 53, Title 26, United States Code.

Four: It was further part of said conspiracy that each defendant unlawfully, willfully and knowingly would receive and possess a firearm which was not then registered to him in the National Firearms Registration and Transfer Record.

The indictment goes on to list seven overt acts allegedly committed in furtherance of the conspiracy. I will read those to you in a little while.

In order to find one of the defendants guilty of conspiracy as charged in the first count of the indictment you must find as to that defendant each of the following elements beyond a reasonable doubt.

First, that at sometime during the period from on or about November 20, 1976, through December 31, 1976,

1 mdrf 14

2 in the Southern District of New York an agreement existed
3 among the named defendants and others, or between any
4 two such persons.

5 Second, that it was an object of this agreement
6 for the defendants to unlawfully transfer firearms
7 without having filed a written application to do so,
8 without having paid the required transfer tax, and without
9 approval of the Secretary of the Treasury or his delegate
10 or to unlawfully receive or possess a firearm not
11 identified by a serial number, or for each of them to
12 receive and possess a firearm not then registered to him
13 in the National Firearms Registration and Transfer Record.

14 Third: That the defendant knowingly associated
15 himself with the conspiracy and participated in it.

16 Fourth: That one of the conspirators, not
17 necessarily a defendant, knowingly committed at least one
18 of the overt acts set forth in the indictment at or about
19 the time and place alleged.

20 Now, what is a conspiracy? A conspiracy is a
21 combination or agreement of two or more persons to accomplish
22 a criminal or unlawful act by concerted action through
23 criminal or unlawful means.

24 The gist of the crime of conspiracy is the unlawful
25 combination or agreement to violate the law.

Whether or not either defendant accomplished what it is alleged he conspired to do is immaterial to the question of whether he is guilty or not guilty. A conspiracy has sometimes been called a partnership in criminal purposes in which each member becomes the agent of every other member. However, to establish that a conspiracy existed the government is not required to show that two or more persons sat around a table and entered into a solemn compact orally or in writing, stating that they have formed a conspiracy to violate the law, setting forth the details of the plans, the means by which the unlawful project is to be carried out, or the part to be played by each conspirator.

Indeed, it would be extraordinary if there were such a formal document or specific oral agreement. Your common sense will tell you that when people in fact undertake to enter into a criminal conspiracy much is left to unexpressed understanding; conspirators don't usually reduce their agreement to writing or acknowledge it before a notary public nor do they publicly broadcast their plans. From its very nature conspiracy is almost always characterized by secrecy, rendering detection difficult.

Thus, it is sufficient if two or more persons in some manner or through some contrivance impliedly

mdrf 16

or tacitly come to a common understanding to violate the law.

To simplify this perhaps a bit more, success in carrying out the objective of the venture, if you believe it was successful, may serve as proof that there was a common venture or agreement.

In determining whether there has been an unlawful agreement you may judge acts and conduct of the alleged members of the conspiracy which are done to carry out an apparent criminal purpose. The adage actions speak louder than words is applicable here.

Usually, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators, which acts, however, when taken together in connection with each other and with the reasonable inferences flowing from them show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof.

If after consideration of all the evidence you find beyond a reasonable doubt that the minds of at least two of the alleged conspirators -- that is, any two-- met in an understanding way and that they agreed, as I have explained the conspiratorial agreement to you, to work in furtherance of the unlawful scheme alleged in the

mdrf 17

indictment then proof of the existence of a conspiracy is established.

A conspiracy once formed is presumed to have continued until its objectives are accomplished or there is an affirmative act or termination by its members. So, too, once a person is found to be a member of a conspiracy he is presumed to continue his membership until its termination unless there is affirmative proof offered of withdrawal or disassociation.

If you find that a conspiracy existed it is not required that the government prove that all the means in the indictment of furthering it in fact were brought to play. If you find that one or more of the means were used to achieve an objective that would be sufficient.

The indictment charges that the conspiracy existed from on or about the 20th day of November 1976 through December 31, 1976. You need not find that the conspiracy began and ended exactly on those dates. If you find at sometime during this period the conspiracy existed, that is sufficient.

You must also find, however, that the conspiracy existed at least in part in the Southern District of New York. This element will be met if you find that any one or more significant conspiratorial acts occurred

mdrf 18

1 within that area which includes the Bronx. Once you
2 are satisfied that the conspiracy charged existed you
3 must ask yourself whether each defendant whose guilt
4 you are considering was a member.
5

6 In deciding whether the defendant was a member
7 of the conspiracy you should consider whether on all the
8 evidence the defendant knowingly and purposely entered
9 that conspiracy.

10 In determining whether the defendant became a
11 member of the conspiracy you must determine not only whether
12 he participated in it but whether he did so with knowledge
13 of its unlawful purpose. Did he join with an awareness
14 of at least some of the basic aims and purposes of the
15 conspiracy?

16 Knowledge is a matter of inference from proven
17 facts, Science has not devised a way to permit us to
18 enter into a man's mind, and to know with exactitude
19 what he knows or thinks.

20 However, you do have before you evidence of
21 certain acts on the part of each defendant. The government
22 contends that these acts show beyond a reasonable doubt
23 knowledge on the part of that defendant of unlawful purpose.
24 It is not necessary that the defendant be fully informed
25 as to the details of the scope of the conspiracy in order to
justify any planning of knowledge on his part.

1
2 To have guilty knowledge, the defendant need
3 not know the full extent of the conspiracy and all of
4 its details and actors.

5 I want to caution you that mere association
6 with one or more of the conspirators does not make one
7 a member of the conspiracy, nor is knowledge without
8 participation sufficient.

9 What is necessary is that the defendant
10 participate with knowledge of at least some of the
11 purposes of the conspiracy and with the intent to aid in
12 the accomplishment of these unlawful acts.

13 Let me also caution you that you do not
14 have to find before you may consider a particular defendant
15 a member of the conspiracy that he knew that the basic
16 purposes and objectives of the conspiracy constituted
17 a violation of federal law, nor do you have to find
18 that the acts which constituted his participation in the
19 conspiracy were themselves substantive violations of
20 the law.

21 Once you have found the conspiracy to exist
22 and the defendant to have knowingly participated in it,
23 the extent of his participation has no bearing on his
24 guilt or innocence. The guilt of a conspirator is not
25 measured by the extent or duration of his participation.

1
2 Even if he participated in it to a degree more limited
3 than that of his coconspirators, he is equally culpable
4 so long as he was in fact a conspirator. In other words,
5 it is not necessary for a conspirator to have joined
6 the conspiracy at its outset; he may join it at any
7 point in its progress and still be held responsible for
8 all that was done before he joined and all that may be
9 done thereafter during the conspiracy's existence and
10 while he remains a member.

11 Moreover, once you are satisfied beyond a
12 reasonable doubt that a conspiracy existed and that a
13 defendant on trial was a member, then the acts and
14 declarations of any other person found to be a member,
15 whether a defendant here on trial or any other defendant
16 not on trial, made during its pendency and in furtherance
17 of its objectives are considered the acts and declarations
18 of all other members even though they were not present.

19 Therefore, statements of any conspirator
20 which are not in furtherance of the conspiracy or made
21 before its existence or after its termination may be con-
22 sidered as evidence only against the person making it.
23 All of the conspirators need not be acquainted with each
24 other. They may not have previously associated together.
25 Indeed, one of the defendants may know only one other

1 mdrp 3
2 member of the conspiracy. But if he enters into an
3 unlawful agreement with that other member of the con-
4 spiracy to effectuate some purpose of the conspiracy, he
5 becomes a party to the conspiracy.

6 If you find that a conspiracy existed, that
7 it had at least one of the objectives which I have dis-
8 cussed, and that the defendant was a member of the
9 conspiracy, there is a fourth element to consider. That
10 is the requirement of an overt act. You may not find the
11 defendant guilty of conspiracy unless and until you are
12 convinced beyond a reasonable doubt that at least one
13 overt act charged in the indictment was committed by
14 at least one of the conspirators in the Southern District
15 of New York. That is for present purposes in the Bronx.

16 The offense of conspiracy is complete when
17 the unlawful agreement is made and any overt act is done
18 by a conspirator to effect the object of the conspiracy.

19 Hence, the overt act required is one which
20 furthers the objectives or purposes of the conspiracy.
21 It does not have to be a criminal act or an act which of
22 itself constitutes an objective of the conspiracy.

23 In fact, it may be an act which is innocent
24 on its face but it must be of such character that it
25 furthers or promotes or aids or assists in accomplishing

1 a purpose of the conspiracy.

2
3 It is not necessary for you to find that
4 all of the alleged overt acts charged in the indictment
5 were committed, nor is it necessary that an overt act
6 implicate a defendant on trial before you. Nor do you
7 have to find that either of the defendants had something
8 to do with the overt act committed. It is enough if you
9 find that at least one of the named overt acts charged
10 in the indictment was committed in furtherance of the
11 conspiracy by any one of the conspirators.

12 With this in mind, let me read to you the
13 overt acts which are charged in the indictment.

14 The government must prove that at least one
15 of the overt acts was committed in furtherance of the
16 conspiracy.

17 In or about late November or early December,
18 1976, defendant Gjerdj Kalaj had a conversation with
19 Matthew Raffa in the vicinity of 80 West Kingsbridge Road,
20 Bronx, New York, about the potential sale of pen guns to
21 Matthew Raffa.

22 2. On or about December 20, 1976, the defendants
23 Gjerdj Kalaj, Lawrence Morici and James Johnson received
24 100 pen guns at a bar in the vicinity of 47th Street and
25 Seventh Avenue, Brooklyn, New York.

mdrp 5

3. On or about December 21, 1976, in the vicinity of 80 West Kingsbridge Road, Bronx, New York, the defendant James Johnson handed the defendant Gjerdj Kalaj a loaded unserialized pen gun.

4. On or about December 21, 1976, in a car in the vicinity of West Kingsbridge Road, Bronx, New York, the defendant Gjerdj Kalaj handed Matthew Raffa a box containing unserialized pen guns.

5. On or about December 21, 1976, in the vicinity of West Kingsbridge Road, Bronx, New York, the defendant Gjerdj Kalaj received approximately \$2,400 from Matthew Raffa.

6. On or about December 21, 1976, the defendant Lawrence Morici had a telephone conversation in which he asked, in substance, when he would get \$300.

7. On or about December 21, 1976, in the vicinity of 77th Street and 17th Avenue, Brooklyn, New York, defendant Lawrence Morici received approximately \$300 from Matthew Raffa.

You are instructed that a conspiracy once formed is presumed to have continued until its objectives are accomplished or that there is an effective termination act by its members as I have already told you.

Turning to the substantive counts, only defendant

1 mdrp 6

2 Kalaj is named in them. Let us look at Count Two.

3 Count Two of the indictment charges the defendant
4 Kalaj with violating Title 26, U. S. Code, Section 5826(e),
5 which provides that "It shall be unlawful for any person
6 (e) to transfer a firearm in violation of the provisions
7 of this chapter."

8 Included among the provisions of this chapter
9 are Sections 5811 and 5812 of Title 26, U. S. Code.

10 Section 5811 relating to transfer taxes provides
11 as follows:

12 "(a) Rate: There shall be levied, collected
13 and paid on firearms transferred a tax at" -- and then
14 they specify a rate.

15 "(b) By whom paid: The tax imposed by Sub-
16 section (a) of this section shall be paid by the transferrer.

17 "(c) Payment: The tax imposed by Subsection (a)
18 of this section shall be payable by appropriate stamps
19 prescribed for payment by the Secretary of the Treasury
20 or his delegate."

21 Section 5812 provides in part as follows:

22 "(a) Application: A firearm shall not be
23 transferred unless (1) the transferrer of the firearm has
24 filed with the Secretary" -- again of the Treasury -- "or
25 his delegate a written application in duplicate for the

mdrp 7

transfer and registration of the firearm to the transferee on the application form prescribed by the secretary or his delegate.

"(2) Any tax payable on the transfer is paid as evidence by the proper stamp affixed to the original application form," and

"(6) The application form shows the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee."

Accordingly, in order to find the defendant Kalaj guilty of illegally transferring the firearm as charged in Count Two, it is necessary for you to find beyond a reasonable doubt each of the following four elements:

First: That on or about December 21, 1976, he transferred a firearm, as that term will be defined;

Second: That the transfer occurred in the Southern District of New York;

Third: That the transfer was in violation of law because defendant Kalaj had not filed a written application with the Secretary of the Treasury or his delegate for the transfer and registration of the firearm, had not paid the transfer tax or had not obtained the approval of the Secretary of the Treasury or his delegate

1 for the transfer and registration of the firearm.

2 And, fourth: That the transfer was unlawful,
3 willful and knowing.

4 The term transfer is defined by
5 Title 26, U. S. Code, Section 5845 (j) as follows:
6

7 "The term transfer and various derivatives of
8 such word shall include selling, assigning, pledging,
9 leasing, loaning, giving away, or otherwise disposing of."

10 The term firearm is defined by Title 26, U. S.
11 Code, Section 5845 (a) to include in pertinent part:

12 "Any other weapon as defined in Subsection (e)."

13 Subsection (e), in turn, defines any other
14 weapon in pertinent part as any weapon or device capable
15 of being concealed on the person from which a shot can
16 be discharged through the energy of an explosive.

17 To satisfy the first element of Count Two,
18 you must find that the 100 pen guns mentioned therein
19 are firearms, and that they were transferred as I have
20 defined those terms.

21 The second element requires a finding that
22 this transfer took place in the Southern District of
23 New York, which again includes the Bronx.

24 As to the third element of the second count,
25 in order to convict the defendant Kalaj of the crime

mdrp 9

charged in Count Two, you must be satisfied beyond a reasonable doubt that at least one firearm was transferred without a written application having been filed with the Secretary of the Treasury, or his delegate, for the transfer and registration of the firearm or without the tax due and payable on the transfer of the firearm having been paid, or without approval of the Secretary of the Treasury or his delegate having been secured for the transfer and registration of the firearm.

I instruct you that these requirements are stated in the alternative. You may find this third element if you are satisfied that an application had not been filed, or that the tax had not been paid, or that the necessary approval had not been obtained.

You need not find that all three omissions occurred in order to convict.

The final element of the crime charged in Count Two is that the defendant has acted knowingly and willfully in transferring the pen guns.

You will remember that an act is done knowingly and willfully if it is done voluntarily and purposely. An act is done willfully and unlawfully if it is done with an evil intent or purpose. You may find that the defendant acted knowingly and willfully if he acted

mdrp 10

voluntarily and purposely and not because of mistake or inadvertence or any other innocent reason.

However, willfully does not mean that the defendant, in addition to knowing what he is doing, must also suppose that he is breaking the law; for ignorance of the law is no excuse.

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the times in question.

Direct proof is unnecessary. These questions of knowledge and willfulness, like all other questions of fact, are solely for you to determine. Medical science has not as yet devised an instrument by which you can go back and determine what the purpose was in one's mind when he performed certain acts. Rarely is direct proof available that one had knowledge of a fact or intended to bring about a result.

Accordingly, intent, willfulness, and knowledge, are usually established by surrounding facts and circumstances as of the time the acts occurred or events took

29 mdrp

place, and the reasonable inferences to be drawn therefrom.

This is referred to as circumstantial evidence.

I further instruct you that you are not required to find that the defendant knew that an application for the transfer of registration of firearms had not been filed or was required to be filed with the Secretary or with his delegate, or that the defendant knew the tax due and payable on the transfer of a firearm had not been paid or was required to be paid, or that the defendant knew that the approval of the Secretary and his delegate for the transfer and registration of a firearm had not been secured or was required to be secured.

It is sufficient if you find that the defendant transferred at least one pen gun with an awareness of what it was. The defendant Kalaj is charged in Count Three with having violated Title 26, U. S. Code, Section 35861 (i), which in part provides that it shall be unlawful for any person to receive or possess a firearm which is not identified by a serial number as required by this chapter.

Elsewhere in the chapter it is stated that each manufacturer and importer, and anyone making a firearm, shall identify each firearm manufactured, imported or made, by a serial number which may not be readily

1 30 mdrp

2 removed, obliterated or altered.

3 The chapter further provides that any person
4 who possesses a firearm which does not bear the serial
5 number and other information required by the subsection
6 which I just read shall identify the firearm with a
7 serial number assigned by the Secretary of the Treasury
8 or his delegate.

9 In other words, to find the defendant Kalaj
10 committed the offense charged in Count Three, you must
11 find beyond a reasonable doubt each of the following
12 four elements.

13 First, that on or about December 21, 1976, he
14 received or possessed a firearm as I already defined that
15 term for you in connection with Count Two.

16 Second, that this took place in the Southern
17 district of New York, that is for present purposes in the
18 Bronx.

19 Third, that the firearm received or possessed
20 was not identified by a serial number in the manner re-
21 quired by the statute.

22 Fourth, that the receipt or possession was un-
23 lawful, willful and knowing.

24 I have already defined a firearm for you in
25 connection with Count Two; and that definition applies

1 31 mdrp

2 to Count Three as well.

3 If you find beyond a reasonable doubt that
4 at least one of the pen guns allegedly involved here was
5 a firearm as that term has been defined for you, then you
6 must determine whether or not on or about December 21,
7 1976, defendant Kalaj received or possessed it.

8 To receive an article is to take it into
9 possession and control. That is to accept custody of it.
10 The word "possess" has its everyday common meaning. That
11 is, to have something within one's control either actually
12 or constructively. Thus, a person who knowingly has
13 direct physical control of a substance, such as a pen gun
14 at a given time, is then in actual possession of it. And
15 a person who although not in actual possession knowingly
16 has both the power and the intention at a given time to
17 exercise dominion or control over a thing either directly
18 or through another person or persons is then in constructive
19 possession of it.

20 The possession element is therefore met if
21 you find that the defendant Kalaj had actual or construc-
22 tive possession of a pen gun.

23 The third element requires a finding that at
24 least one of the pen guns lacked the required serial
25 numbers. There does not appear to be any dispute as to

1 32 mdrp

2 this, but you must still find it to be the case before
3 you may return a verdict of guilty on this count.

4 Finally, the fourth element, that defendant
5 Kalaj possessed at least one of the pen guns willfully
6 and knowingly has already been explained to you for
7 willfully and knowingly have the same meaning in Count
8 Three as they did in Count Two.

9 Again, I instruct you that the requirement of
10 proving that the defendant acted knowingly does not
11 make it necessary for the government to show that the
12 defendant knew about the serialization provisions of the
13 law or that the defendant's pen guns had physical charac-
14 teristics which might make them subject to serialization.

15 Accordingly, to satisfy this element, if you
16 find that Kalaj possessed at least one of the 100 pen guns,
17 you need only find that the defendant was aware of what it
18 was.

19 Turning to Count Four of the indictment, the
20 defendant Kalaj is charged with having violated Title 26,
21 U. S. Code, Section 5861 (d), which in part provides
22 that it shall be unlawful for any person to receive or
23 possess a firearm which is not registered to him in the
24 National Firearms Registration and Transfer Record.

25 In order to find that the defendant Kalaj

committed the offense charged in Count Four, you must find beyond a reasonable doubt each of the following four elements:

First, that on or about December 21, 1976, he received or had possession of a firearm;

That such receipt or possession took place in the Southern District of New York;

Third, that the firearm which he received or possessed was not then registered to him in the National Firearms Registration and Transfer Record;

Fourth, that his receipt or possession was unlawful, willful and knowing.

I have already defined the term firearm in connection with Count Two, and the terms receive and possess in connection with Count Three. Those definitions apply to Count Four as well. And as in the other counts you are instructed that the Bronx is located within the Southern District of New York.

The third element of Count Four requires a finding that at least one of the pen guns was not registered to defendant Kalaj in the National Firearms Registration and Transfer Record. Although this does not seem to be in dispute, you are instructed that you must still find it to be the case beyond a reasonable doubt before you

1 34 mdrp

2 may return a verdict of guilty on this count.

3 The evidence in this case includes the testimony
4 of Charles Baum that after diligent search of the National
5 Firearms Registration and Transfer Record, no record was
6 found that any firearm was registered to Kalaj. From this
7 testimony you may find that the government has sustained
8 its burden of proving non-registration of the weapon
9 beyond a reasonable doubt.

10 However, it is for you to determine what
11 evidence you will accept and what weight you will attach
12 to it.

13 The fourth element, that defendant Kalaj
14 received and possessed at least one pen gun willfully and
15 knowingly, has already been explained to you, and the
16 terms willfully and knowingly have the same meaning in
17 Count Four that they had in Count Two.

18 Again, I instruct you that the government need
19 not show that the defendant knew about the registration
20 provisions of the law or that he knew the pen gun had
21 physical characteristics that might make it subject to
22 registration. It is only necessary for you to find that
23 the defendant knew what the object in his possession was.

24 The fifth count in this indictment charges
25 the defendant with carrying a firearm during the commission

1 35 mdrp

2 of a felony. The applicable law, Section 924 (c) (2)
3 of Title 18, U. S. Code, reads as follows:

4 "Whoever carries a firearm unlawfully during
5 the commission of any felony for which he may be prosecuted
6 in a court of the United States shall be guilty of a crime."

7 Before the defendant Kalaj can be convicted
8 on Count Five, the government must prove beyond a reason-
9 able doubt each of the following elements:

10 First, that the defendant was committing a
11 felony on or about the 21st day of December, 1976;

12 Second, that during the commission of the
13 felony, he was carrying a firearm;

14 Third, that he was carrying the firearm unlaw-
15 fully; and

16 Fourth, that the defendant acted knowingly
17 and willfully.

18 The first element of the Count Five you must
19 consider is whether the defendant was committing a federal
20 felony on or about December 21, 1976. In this regard,
21 I instruct you as a matter of law that each crime charged
22 in Counts One through Four is a crime which may be
23 prosecuted in a court of the United States, that is, a
24 federal felony. Thus, if you find either (1) that the
25 defendant Kalaj conspired to violate the gun control

1 36 mdrp

2 statutes, or (2) that he violated the transfer provisions
3 of the gun control statues, or (3) that he violated the
4 serialization provisions of those statutes, or (4) that
5 he violated the registration provisions of those statutes,
6 that is, if you find the defendant guilty of one of the
7 crimes charged in Counts One through Four, the first element
8 of Count Five is established and you need not find him
9 guilty of more than one of the first four counts to
10 satisfy this element.

11 However, if you find the defendant Kalaj not
12 guilty of the crimes charged in each and all of the Counts
13 One through Four, then you must find him not guilty of
14 Count Five.

15 The second element which you must consider is
16 whether the defendant was carrying a firearm during the
17 commission of one of the felonies charged in Counts One
18 through Four of the indictment.

19 Under Count Five of the indictment, the object
20 alleged to be a firearm is a Baretta semi-automatic pistol.
21 For purposes of Counts Five and Six, but not Counts One -
22 Four, a firearm is any weapon which or is designed to or
23 may readily be converted to expel a projectile by the action
24 or an explosive, and it includes the frame or receiver
25 of such a weapon.

37 mdrp

In order for the government to establish that the weapon in question was a firearm, it is not necessary for it to prove that the gun was in fact fired. Rather, you are entitled to but need not necessarily infer that the weapon was a firearm from all of the surrounding circumstances, including the use and appearance of the weapon and the testimony of the government's firearms expert.

The third element you must find is that the defendant possessed the firearm unlawfully. In this regard I instruct you that Sections 265 and 265.20 of the New York Penal Law make it unlawful to possess a loaded firearm or to possess a firearm at the same time that one possesses ammunition unless a license for such firearm has been issued pursuant to Section 400 of the New York Penal Law.

Under New York law, a firearm means any pistol, revolver or other firearm of a size which may be concealed on a person. In order to satisfy the element of unlawfully carrying, it is sufficient if you find that the defendant had in his possession a loaded Baretta semi-automatic pistol and that he was not licensed to carry that weapon.

It is also necessary for you to find that the defendant acted knowingly and willfully. As I have pre-

1 38 mdrp

2 viously instructed you, an act is done knowingly if it is
3 done voluntarily and purposely and not because of mistake,
4 accident, mere negligence or other innocent reason.

5 An act is done willfully if it is done knowingly
6 and deliberately. Willfully does not mean that the
7 defendant in addition to knowing what he is doing must
8 also know he is breaking the law, since ignorance of
9 the law is no excuse.

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11 (Continued on next page.)
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1
2 Like the fifth count, the sixth count in
3 this indictment charges the defendant Kalaj with carrying
4 a firearm unlawfully during the commission of a felony.

5 However, in this count the firearm in question
6 is a loaded pen gun. Before the defendant Kalaj can be
7 convicted on Count Six, the government must prove beyond
8 a reasonable doubt each of the following elements:

9 First, that the defendant was committing a
10 federal felony on or about December 21, 1976;

11 Second, that during the commission of the
12 felony, he was carrying a firearm;

13 Third, that he was carrying the firearm un-
14 lawfully; and

15 Fourth, that the defendant acted knowingly
16 and willfully.

17 The first element of Count Six which you
18 must consider is whether the defendant was committing a
19 federal felony on or about December 21, 1976. This
20 element is the same as the first element of Count Five
21 which I had previously told you about. Everything I said
22 in relation to that element applies here.

23 In summary, if you find that the defendant
24 is guilty of any of the crimes alleged in Counts One, through
25 Four, then this element is satisfied.

1 The second element which you must consider
2
3 is whether during the commission of the felony, the
4 defendant was carrying a firearm. The definition of a
5 firearm for this count is the same as that given to you
6 in connection with Count Five. However, as I have noted,
7 the item which the government contends is a firearm
8 with respect to this count is the allegedly loaded pen gun
9 which Johnson allegedly handed Kalaj before Kalaj and
10 Raffa left the real estate office.

11 As in Count Five, the third element you must
12 find is that the defendant possessed the firearm unlawfully.
13 Unlawfully simply means contrary to law. In the context
14 of this count, it means carrying a pen gun without serial
15 numbers required by law or without registering in the
16 National Firearms Registration, and Transfer Record.

17 Thus, if you find beyond a reasonable doubt
18 that Kalaj possessed a pen gun which was handed to him
19 by Johnson as distinguished from the hundred pen guns
20 allegedly contained in the box, and the pen gun either
21 had no serial number or was not registered in the National
22 Firearms Registration and Transfer Record, you may find
23 that Kalaj was carrying it unlawfully.

24 It is not necessary that you find that both
25 things are true. It is enough to satisfy this element

1 if you find beyond a reasonable doubt that one of the
2 two is true.
3

4 And, finally, as in Count Five, you must find
5 that the defendant acted knowingly and willfully. As
6 I previously instructed you, an act is done knowingly
7 if it is done voluntarily and purposely and not because
8 of mistake, accident, mere negligence or other innocent
9 reason.

10 An act is done willfully if it is done knowingly
11 and deliberately. Willfully does not mean that the de-
12 fendant in addition to knowing what he is doing must
13 also know that he is breaking the law.

14 Again, ignorance of the law is no excuse.

15 Now, with respect to all of the charges in
16 the indictment, the defendant Galaj contends that he was
17 the victim of entrapment by an agent of the government.

18 Entrapment is a legal term which has a technical
19 meaning differing from that which it has in ordinary usage.
20 Therefore, I must explain the meaning of the word as it
21 is used in the law.

22 Entrapment occurs in essence when the idea or
23 design of committing the crimes alleged originates with
24 a law enforcement officer, rather than with a defendant.
25 The defendant has no disposition, intent or purpose to

hpro 42

1
2 commit the alleged offenses and the law enforcement officer
3 or government employee implants in the mind of an otherwise
4 innocent defendant the disposition to commit the alleged
5 offense and instigates and incites its commission in order
6 that the defendant might be arrested and prosecuted.

7 Thus if you find any credible evidence
8 creating the reasonable possibility that a government
9 agent or employee instigated and incited or otherwise
10 induced the defendant to commit the crimes charged, then
11 the government must prove beyond a reasonable doubt that
12 such inducement was not the cause or creator of the crime,
13 that is that the defendant had been predisposed and willing
14 to commit the crimes.

15 But if you find beyond a reasonable doubt
16 that an agent or employee of the government merely afforded
17 a favorable opportunity or facilities to the defendant for
18 the commission of the alleged crime and that the defendant
19 was ready, willing and able to commit the offenses charged,
20 then the government's conduct does not constitute entrap-
21 ment.

22 Entrapment would occur only if you find that
23 the defendant lacked the predisposition to commit the
24 alleged offenses and that the government agent actually
25 implanted the criminal design in the mind of the defendant.

1 hprp 43
2 In summary, if you find by a preponderance
3 of the evidence that Kalaj was entrapped as I defined
4 entrapment a few moments ago, then you must find him
5 not guilty.

6 If, on the other hand, you find that the govern-
7 ment has proved each element of any of the crimes charged
8 beyond a reasonable doubt and you do not find by a
9 preponderance of the evidence that Mr. Kalaj was entrapped,
10 then you may find him guilty on the count or counts
11 which you find to have been proved beyond a reasonable
12 doubt.

13 Now, I wish to make some more general comments
14 with respect to the testimony which you have heard these
15 past few days. In performing your function, one of the
16 most important things you have to do is to pass upon
17 the credibility, that is, the believability of the various
18 witnesses who have appeared before you.

19 In passing on the credibility of each of the
20 witnesses, there are certain considerations you may well
21 have in mind. One of these is the appearance which the
22 witness made when he was on the stand. You should try
23 to size him up. Did he appear to be telling the truth?
24 Did he appear to be honest? Did he appear to be intelligent?
25 Did he appear to be a person who would have observed

1 accurately what he is telling you about, who would be
2 likely to have remembered it accurately; and who was
3 capable of reporting it to you accurately?
4

5 Another question for you to have in mind
6 regarding each witness is whether the story he has told
7 you is plausible. Does it ring true or are there in-
8 consistencies in it? How does it fit in with the other
9 evidence in the case, which you do believe, to other
10 facts you find to have existed. Does it jibe with other
11 evidence and those facts? In short, does the testimony
12 which was given by the particular witness whose credibility
13 you are considering seem to be plausible. Evidence
14 that a witness pleaded guilty in the past to certain
15 crimes may be considered by you in ascertaining that wit-
16 ness' credibility. By this I mean you may consider the
17 prior conviction in determining the witness' worthiness
18 or belief.

19 Another question you may well ask yourself
20 on passing the credibility of any witness is whether that
21 witness has any bias or interest in the outcome of the
22 case and if so, whether he has permitted that bias or
23 interest to color his testimony. It, of course, does not
24 follow simply from the fact that a witness does have a
25 bias or does have an interest in the outcome of the case

1 hprp 45
2 that testimony is to be disbelieved.

3 In considering the testimony of the government
4 witnesses, you should bear in mind that their testimony
5 is entitled to no greater significance simply because
6 they are employees of the government. Their testimony
7 should be subject to the same considerations you apply
8 to any witness, regardless of their employment by the
9 government.

10 Also there is no presumption against the govern-
11 ment from its failure to call a witness when it appears
12 that his testimony would be merely cumulative or repetitious
13 and of no greater value than that of the witnesses who
14 have in fact testified.

15 In this regard, you are instructed you may
16 not draw any inferences whatsoever from John Johnson's
17 failure to testify, for he was not available to counsel
18 for either side.

19 Now, in this case, both of the defendants
20 testified before you. The law permits but does not require
21 a defendant to testify in his own behalf. Obviously a
22 defendant has a deep personal interest in the result of
23 his trial. Indeed it is fair to say he has the greatest
24 interest. Interest creates a motive for false testimony
25 and a defendant's interest in the result of his trial is

1 of a character possessed by no other witness.

2
3 In appraising the credibility, you may take
4 that fact into consideration. However, I want to say
5 this with equal force to you. It by no means follows that
6 simply because a person has a vital interest in the end
7 result he is not capable of telling a truthful and
8 straightforward story. It is for you to decide to what
9 extent, if at all, the defendant's interest has affected
10 or colored his testimony.

11 You also heard testimony about statements made
12 by Lawrence Morici. If you find that he made such
13 statements, then you may give them such weight as you be-
14 lieve his statements deserve after considering all of the
15 circumstances which were brought out in the evidence.

16 Specifically, the government contends that
17 after Lawrence Morici was arrested, he was questioned
18 by Special Agent Raffa in the presence of other agents.

19 The government contends that at that time
20 Morici said in substance that the \$300 seized from him
21 was his, and that he was selling jeans, not guns, and
22 didn't know anything about guns.

23 The government submits that the evidence has
24 shown that it was Special Agent Raffa who had given Morici
25 the \$300 and that Morici had sold the initial lot of 100

1 47 hprp

2 pen guns to Kalaj and Johnson and that he was negotiating
3 with Raffa directly to sell another 100 pen guns.

4 The government contends that this evidence
5 shows that the statements Morici made to Raffa after
6 he was arrested were false.

7 Defendant Morici on the other hand contends
8 that he never claimed that the \$300 seized from him had
9 been received from anyone other than Agent Raffa and
10 that any statements to the effect that he only sold
11 jeans or that the \$300 received from Agent Raffa was
12 for jeans were not intended to divert suspicion or to mis-
13 lead the agents, but were intended to stop the agents'
14 persistent questioning.

15 I charge you that exculpatory statements
16 voluntarily and intentionally made, when shown to be
17 false, are evidence of guilty consciousness and have
18 independent probative force.

19 In weighing the evidence before you, you
20 should bear in mind that there are two types of evidence,
21 direct evidence and circumstantial evidence. Evidence
22 is considered direct when it is introduced by a witness
23 who testifies to what he saw, heard or observed, what he
24 knows of his own knowledge or something which comes to
25 him by virtue of his senses. Circumstantial evidence

48 hprp

is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind. Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

(Continued on next page.)

hprf 1

Now, circumstantial evidence we believe is of no less value than direct evidence for in either case you must be convinced beyond a reasonable doubt of the guilt of a defendant. Let us take one simple example, one which is often used in this courthouse to illustrate what is meant by circumstantial evidence.

We will assume that when you entered the courthouse this morning the sun was shining brightly outside and it was a clear day. It was not raining, the sky was clear. Now assume that in this courtroom the blinds are drawn and the drapes are drawn so that you cannot look outside, Assume as you are sitting here in the jury box and despite the fact that it was dry when you entered the building somebody walks in carrying an umbrella from which water is dripping followed in a short while by a man wearing a wet raincoat.

Now, on our assumption that you cannot look out of the courtroom and see whether it is raining or not, if you were asked is it raining you could not say that you know it directly or from your observation, but certainly upon the combination of facts given, even though when you entered the building it was not raining outside it would be reasonable and logical for you to conclude that it is now raining outside.

1 hprf 2

2 That is about all there is to circumstantial
3 evidence. You infer on the basis of reason and experience
4 from an established fact the existence of some further
5 fact. There are times when different inferences may be
6 drawn from facts, whether they are proved by direct or
7 circumstantial evidence. The government asks you to draw
8 one set of inferences while the defendants ask you to
9 draw others. It is for you to decide and for you alone
10 what inferences you will draw.

11 But remember, you are to decide the case
12 upon the evidence and the evidence alone and you must not
13 be influenced by any assumption, conjecture or sympathy
14 or any inference not warranted by the facts until proven
15 to your satisfaction.

16 In conclusion, ladies and gentlemen, the purpose
17 of your deliberations is to exchange views with your
18 fellow jurors, to discuss and consider the evidence,
19 to listen to each other's argument, to present your own
20 views and to reach a unanimous verdict based solely and
21 only on the evidence if you can do so without violence to
22 your own individual conscience and judgment.

23 Each of you must decide the case for yourself
24 but do so only after the impartial consideration of the
25 evidence in the case with your fellow jurors. If you

1 hprf 3

2 fail to find beyond a reasonable doubt that the law has
3 been violated you should not hesitate for any reason to
4 find a verdict of acquittal. On the other hand
5 if you should find that the law has been violated as
6 charged you should not hesitate because of sympathy or any
7 other reason to render a verdict of guilty as a clear
8 warning that crimes of this character may not be committed
9 with impunity. The public is entitled to be assured of
10 this. Do not hesitate to reexamine your views and change
11 your opinion when after discussion it appears to be
12 in error.

13 But if after carefully weighing all of the evidence
14 in the case and the argument of your fellow jurors you
15 hold a conscientious view which differs from the others,
16 you are not to yield your view simply because you are
17 outnumbered. Your final vote must reflect your objective
18 and deeply thought out determination of the issues.
19 If in the course of your deliberations you need to
20 examine any of the exhibits or want to hear sections of
21 the tapes or desire to have any portion of the testimony
22 read back, you may send in a note to the Court asking for
23 whatever will clear up any of the questions you may have.

24 There is a caveat, admonition I must ask of
25 you. When you do have a question you should be very specific

1 hprf 4

2 about that question. If you are specific we can meet
3 your request more quickly. In communicating with the Court
4 I should admonish you that you should indicate how your
5 vote may then be divided. The reason for that is simple.
6 Your deliberations are secret and it would be a breach
7 of ethics to communicate at any time how the jury has
8 voted except to announce that you have reached a unanimous
9 verdict. In the event you members cannot agree on
10 a unanimous verdict after deliberation do not hesitate to
11 indicate how the jury has voted or why you cannot agree
12 on a verdict. Merely indicate that you consider yourself
13 deadlocked. Mr. Foreman, if I should ask you any questions
14 in court during the course of your deliberation because
15 before you answer carefully consider my question.
16 The answer calls for a yes, no, or a maybe reply.
17 Give only that reply to my question and do not volunteer
18 any additional statements.

19 In any event, do not say more than necessary to
20 inform me of your answer. When you indicate that you
21 have reached a verdict do not indicate what your verdict
22 is. You will be asked to state that orally through your
23 foreman in open court.

24 I will conclude by simply saying your oath
25 sums up your duty and that is without fear or favor to

1 hprf 5

2 anyone you will well and truly try the issues between
3 these defendants and the Government of the United States
4 based solely upon the evidence which has been introduced
5 and the Court's instructions as to the law.

6 Remember, a separate crime or offense is charged
7 against each of the defendants in the first count of the
8 indictment and Defendant Kalaj is also charged in five
9 further counts. Each offense and the evidence pertaining
10 to it should be considered separately. The fact that you
11 may find one of the accused guilty or not guilty of one
12 of the offenses charged should not control your verdict
13 as to any other offense or defendant.

14 Your verdict with respect to each count and each
15 defendant, whether it be guilty or not guilty must be
16 unanimous. This case is important to the government and
17 it is important to the defendants. Give it your faithful
18 consideration.

19 Will you swear the marshals, please.

20 (Marshals sworn.)

21 THE COURT: We will leave you in the jury box
22 now and we will have a conference in chambers.

23 (In the robing room.)

24 THE COURT: Exceptions, additions.

25 MR. BERNSTEIN: With regard to your charge on

hprf 6

entrapment I didn't hear it before you gave it. I object to that charge. I find it, respectfully, vague and confusing and I do not agree with its interpretation of the law especially regarding preponderance of evidence, and you didn't state it is the government's duty to prove beyond a reasonable doubt, you didn't explain what the term inducement meant, or if they find defendant was entrapped he cannot be found guilty on any of the counts of the indictment.

You didn't explain to the jury exactly how to work.

THE COURT: I'm not telling the jury how to work. You made your objection. It is on the record. Anything else?

MR. BERNSTEIN: That's all.

MR. GORDON: Other than with respect to requirement of scienter, and also with respect to your charging false exculpatory statements at all; also in the beginning of your charge you said that in the existence of an indictment there is no presumption of guilt and I except to that. The jury may feel that there may be an inference of guilt.

THE COURT: What else?

MR. GORDON: Other than what I mentioned

1 hprf 7

2 before, nothing.

3 THE COURT: That's on the record.

4 MS. NEUGARTEN: Your Honor, I'm in a strange
5 position. I am really advancing the comments the
6 defendants' might but I want to make certain this is
7 clear. You charged Johnson was not available to either
8 side. The record is I have received permission from
9 Washington to ask your Honor for immunity. The record is
10 also --

11 THE COURT: As of this moment, he is not available
12 to either side because an application has not been made.

13 MR. GORDON: I specifically except to the charge
14 dealing with Johnson.

15 MR. BERNSTEIN: I do as well, your Honor.

16 THE COURT: We will let the jury go to lunch.
17 And, you are not to leave this court.

18 MR. BERNSTEIN: The only way I will leave the
19 court is if I get your permission. Why do you direct it
20 specifically to me?

21 THE COURT: Somebody said you have to go to
22 Family Court.

23 MR. BERNSTEIN: I said I would ask you first.

24 MS. NEUGARTEN: Your Honor, I understand you
25 will be trying another case in this courtroom. The only

1 hprf 8

2 request the government has if the jurors wish to hear
3 the dates we will now disassemble the sound equipment --

4 THE COURT: Don't disassemble it. What I am
5 thinking of doing is moving to chambers to try this case.
6 It is a nonjury case.

7 MR. GORDON: Do we have the Court's permission
8 to go to lunch?

9 THE COURT: Certainly.

10 MR. GORDON: And I remain in my office at
11 2 Lafayette Street. I have left my office as late as seven
12 minutes before the hour and arrived here before the hour.

13 THE COURT: All right. Where is your office?

14 MR. BERNSTEIN: In Queens. I have one in the
15 Bronx as well but I will stay here.

16 MS. NEUGARTEN: May I return to the office which
17 is in the annex, of course?

18 THE COURT: Yes. As soon as we get a message
19 we will let you know.

20 MR. GORDON: May my client also stay in my
21 office?

22 THE COURT: Yes. As a matter of fact if you
23 want to take Mr. Bernstein with you and you got air
24 conditioning, take him with you too, just so long as
25 we don't get you lost somewhere. Let us know where

1 hprf 9

863

2 you are going to be.

3 THE COURT: All right.

4 (In open court, jury present.)

5 THE COURT: One further instruction to you.

6 When you go to lunch, you are not to discuss the case
7 because you will have the two alternates with you. I
8 am instructing the marshals that if all of those of you
9 who are regular jurors return to the jury room, the
10 alternates are to be discharged with the thanks of the
11 Court upon return. The alternates are to return with
12 the jury, not in the jury room, however. When they go in
13 there, if we have all 12, you stay out here and you will
14 be discharged by the marshals. The reason for that
15 is one of experience and that is I had a person become
16 ill at lunch and I had then a nonfunctioning jury
17 and I had discharged the alternates before I sent them
18 to lunch.

19 Enjoy your lunch and I will expect you back
20 in about an hour's time or something close to that, whenever
21 you can get food. You will be in the custody of the marshals
22 throughout lunch.

23 (Jury left the courtroom.)

24 (2:15p.m.)

25

(Jury not present.)

THE COURT: We received a note from the jury to the effect that "May we listen to the direct testimony of agent Raffa up to the time of arrest and the direct testimony of Gjerdj Kalaj, also up to the time of his arrest." Obviously I am not going to direct the reading of all of the testimony. We are not going to retry the case and I am going to instruct the jury to be more specific as to its request.

MR. BERNSTEIN: If your Honor please, I have an application, if we are finished with this. Last night your Honor mentioned to the jury not to pay attention to any coverage of the media in this particular time. Unfortunately in the media there was extensive coverage of the Yugoslavian mission by some people identified as Croatian nationalists, which happens to be the same part of the world from which Mr. Kalaj comes, in the Eastern European area and many of the jurors I am afraid may make the connection between Mr. Kalaj, who is Albanian, not Croatian, with the Croats. I know people I have spoken to this morning and last night could not differentiate between the two. I would ask your Honor instruct the jury that Mr. Kalaj is not Croatian, is Albanian and there is no connection between Croats and Albanians.

1
2 THE COURT: I think the application is frivolous,
3 Mr. Bernstein and I will not so instruct the jury. I
4 think we made it particularly clear at the outset of this
5 trial that Mr. Kalaj was Albanian.

6 Marshal, will you get the jury in please.

7 (Jury present.)

8 THE COURT: Good morning, ladies and gentlemen.
9 I have received your note and if you will recollect in
10 my instructions to you I asked that you be specific with
11 regard to any requests as to information or testimony
12 which was given that you wish to have read back. I
13 will not read all of the testimony given by Mr. Raffa and
14 Mr. Kalaj because obviously we would be retrying the
15 case, and we could progress from there through all the --
16 I forget how many pages but it is in excess of four
17 hundred pages, which we would read back to you. What I will
18 ask you to do is to go back in to the jury room and if you
19 have a specific area which you would like read we will do
20 that but we will not retry the case.

21 I would appreciate another note.

22 (Jury left.)

23 (Recess)
24
25

AFTERNOON SESSION

2:05 p.m.

(Jury present.)

(Court's Exhibit 3 marked)

THE COURT: Court's Exhibit 3 which was received at 12:07 reads: "Agent Raffa: and Gjerdj's testimony reference to necessity of Gjerdj going to Pennsylvania to obtain the guns, Gjerdj's testimony with reference to establishment of the \$30 price and later price of \$20 for the additional sixty guns."

You have agreed on what has to be read.

MS. NEUGARTEN: That is correct, your Honor.

MR. GORDON: That is correct.

MR. BERNSTEIN: That is correct.

(Testimony read by reporter.)

THE COURT: All right, ladies and gentlemen, you may go back and deliberate.

(Jury left)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this petition for rehearing with a suggestion for rehearing en banc has been mailed to the United States Attorney for the Southern District of New York.

March 21, 1978

Jonathan J. Silberman